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No. 79-939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent and some Amici Curiae[1] have attempted to expand the issue that

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[1] United States and Equal Employment Opportunity Commission who will hereinafter be referred to as EEOC.

the parties presented to the lower courts for their consideration[2] (Pet. App. 5a, 13a).

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[2] The District Court noted in its opinion of August 30, 1978, (Pet. App. 5a, 13a) that Plaintiff was only relying upon acts relating to the denial of tenure and the termination of his employment for his Title VII claim based upon Plaintiff's representations made at oral argument (J.A. 75-79). After the District Court's initial decision, Respondent failed to dispute this determination in his Rule 59(e) Motion for Reconsideration and brief submitted in support of the same. On appeal, Respondent did not dispute this matter or identify other unrelated acts to the Court of Appeals in his Statement of Issues (J.A. 99,100) or Argument. Only now do Respondent and EEOC seek to raise additional issues (Respondent's Brief, p.7, 8; EEOC Brief, p.4, 5). EEOC asserts that the Respondent was relieved by teaching duties in October 1974. This has never been asserted by Respondent, who continued performing teaching duties until the spring term and his contract expired. These issues, which have been abandoned by the Respondent since briefing in the District Court, are not properly before this Court for consideration, Neely v. Martin K. Eby Const. Co., 386 U.S. 317 (1967), Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976). Moreover, these new issues pertain to the conduct of Defendants McLaughlin and Caldwell. Neither of these persons were identified in any of the complaints filed with either the Federal or State discrimination agencies. These actions were not identified in administrative filings, and

ARGUMENT I

A DENIAL OF TENURE STATUS IS A DISCRETE AND IDENTIFIABLE EMPLOYMENT PRACTICE REQUIRING AN EMPLOYEE TO FILE A CHARGE OF DISCRIMINATION WITHIN THE TIME LIMITATION REQUIREMENTS OF 42 U.S.C. §2000e-5(e) AFTER SUCH A DETERMINATION IS MADE.

Assuming that Respondent is limited to the issues he raised in the courts below, Respondent and Amici[3] argue that the denial of tenure occurred at the expiration of the Respondent's last contract, June 30th, 1975, despite the fact that Respondent filed his complaint with the EEOC on April 4th, 1975[4].

Respondent has conceded that the District Court did not have personal jurisdiction over Defendant McLaughlin (Respondent's Mem. In Opposition to Defendant's Motion to Dismiss p. 26,27). Defendant Caldwell died on October 27th, 1979.

[3] An additional Amici supporting the Respondent's position is the American Association of University Professors, hereinafter referred to as AAUP.

[4] Petitioners contend that this date is still of significance to the Respondent given the applicable law and facts of this case as explained in Argument II, infra.

In order to find a timely filing in this case, Respondent argues that the denial of tenure in March of 1974 was a continuing discriminatory occurrence through the expiration of the terminal year contract[5], thereby allowing a timely filing sometime subsequent to the decision to deny tenure through the expiration of the contract.

The EEOC, on the other hand, admits that the determination to deny Respondent tenure constitutes an occurrence within the definition of 42 U.S.C. §2000 e-2(a)(1) (EEOC Brief 15, 16). In fact, EEOC admits that the Respondent could have filed a complaint in the spring of 1973 when Respondent was initially denied

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[5]This "continuing violation" theory was adopted by the Court of Appeals (Pet. App. 13a-15a) which is indistinguishable from the reasoning of Judge Adams in Evans v. United Air Lines, Inc., 534 F.2d 1247, 1250 (7th Cir. 1976) which was rejected by this Court.

tenure and again in the spring of 1974 when tenure was again denied. Further, it admits that tenure does "significantly affect the faculty member's job security, prestige and compensation" (EEOC Brief page 16). In fact, the Tenure Policy of Delaware State College designates the extent of one's job security in light of tenure decisions (See Tenure Policy pp. 46-49, Exs. to Petitioners' Reply Brief, District Court). A decision on tenure obviously affects a person's terms, conditions and privileges of employment. However, the EEOC suggests that one also can complain when his contractual relationship expires by its terms.

It is on this basis that the EEOC contends that United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) is inapplicable to the present situtation. It is argued that the expiration of the Respondent's terminal year contract "was not an attenuated consequence of an earlier

employment practice", as was the case in Evans.[6] The undisputed and unchallenged practices of the Petitioner College concerning the effects of a denial of tenure unequivocally establish the fact that a terminal year contract is offered and no further employment will be granted a person denied tenure for the second time. Here, there is no doubt that the denial of tenure was the earlier employment practice which resulted in the "attenuated" consequence of the expiration of the Respondent's terminal year contract. Thus, the EEOC's analysis of Evans clearly supports Petitioners' position that the focal point of the Respondent's complaint was his denial of tenure and not the mere expiration of a fully performed academic year contract.[7]

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[6] (EEOC Br. 19.)

[7] What occurred to Respondent in this case is very similar to a situation where a employee during the course of his

In support of Respondent's position, the AAUP suggests that a denial of tenure does not change any of the rights accorded a faculty member (AAUP Brief 14)[8]. The Tenure Policy of the Petitioner of College clearly refutes this contention. The obvious right denied the faculty member is

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employment is denied a promotion or certain seniority benefits, and as a result of such denial, thereafter when unrelated layoffs are required, the lack of these benefits result in this employee being laid off. The uniform application of the layoff procedure is not the eventuality which the employee should have challenged, but rather the failure to receive certain promotional or seniority rights when they were denied him. In the present case, Respondent has not alleged that the college policy regarding employees denied tenure twice has been discriminatorily applied in this case. Rather, Respondent only challenges the denial of tenure itself. Thus, the effect of a neutral policy does not establish a second discriminatory occurrence, cf. United Air Lines v. Evans, supra, at 557, 558.

[8] AAUP argues that since no rights have changed when tenure is denied, there is no reason to complain until a teacher no longer has employment.

indefinite employment in the future. In addition to that, he is not entitled to any further employment beyond the terminal year contract, nor is he entitled to be considered for tenure again. Additionally, such an employee is not eligible to participate in faculty positions or functions requiring tenure status.

Respondent fully appreciated the significance of the same as evidenced by his actions. After the denial, he procured legal counsel and sought to utilize the grievance procedures (J.A. 49-52) to question the decision to deny him tenure, and he filed a charge with the EEOC prior to the expiration of his contract with the College. All these acts clearly refute the argument that Respondent did not believe his rights were not affected by the denial of tenure.

Respondent's position also creates stale claims. The latest tenure decisions complained of were made in February and

March of 1974. Yet, Respondent argues he need not act until December 1975. Moreover, assuming a timely filing was made initially with the State agency, which took no action, it is possible that an actual investigation of this complaint would not be initiated until almost 300 days subsequent to June 30, 1975 which would mean that the Petitioners might first be advised of this complaint in April of 1976, two years subsequent to the time that the tenure decisions were made. Such a practice would clearly frustrate the intent and purpose of the filing requirements of 42 U.S.C. §2000e-5(e).[9]

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[9] It is difficult to understand how a person benefits by being required to wait until he is unemployed or reemployed elsewhere to contest a decision which was arrived at more than a year prior to his unemployment. It would appear to be to the employee's advantage to have a claim of discrimination processed as quickly as possible subsequent to its occurrence, thereby giving the employee the opportunity to have the matter resolved prior to him becoming unemployed and placed in an economically distressful status.

ARGUMENT II

THE COURT OF APPEALS APPLIED THE APPROPRIATE 180 DAY TIME PERIOD TO RESPONDENT'S CLAIM UNDER THE FACTS OF THIS CASE.

Through the initial briefing of this case in this Court, all parties and the Courts deciding this case utilized the 180 day filing requirement of 42 U.S.C. §2000e-5 (e)[10]. Respondent now claims that one who fails to file a timely claim with the state agency and further fails to file any claim with any agency within 180 days of the occurrence is still entitled to utilize the 300 day limitation period. Neither the decisions of this Court nor the statute at issue warrant acceptance of the Respondent's position.

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[10] The precedent in the Court of Appeals was consistent with this position, Bonham v. Dresser Industries, Inc., 569 F.2d 187, 192 n. 5 (3rd Cir. 1978). In Bonham the Court noted that to allow a person who untimely filed a claim with the State agency to take advantage of the 300

Respondent and the EEOC are attempting to utilize the 300 day filing period for the purpose of bringing certain, otherwise, stale claims within the purview of the Title VII claim asserted. Respondent relies upon Mohasco Corp. v. Silver, No. 79-616, 48 U.S.L.W., 4851 (June 23, 1980) for claiming entitlement to the 300 day limitation period.

A significant factual and legal distinction between the present matter and that of Mohasco pertains to the filing of a timely complaint with the appropriate state agency. Under New York law, a discrimination complaint can be filed up to one year after the occurrence. Further, the Court found that a complaint filed 291 days subsequent to the occurrence

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day filing requirement would allow claimants to intentionally wait until the State filing period runs and then take advantage of the longer Federal filing period. The Court noted that this surely was not the intent of Congress.

with the New York agency was a timely filing.[11] The opinion in Mohasco merely outlines how such a timely filing, though made subsequent to 180 days from the occurrence, can be timely filed with the EEOC within the 300 day period.[12]

Respondent and the EEOC assert there is no requirement to file within 180 days of an alleged discriminatory occurence

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[11] Mohasco Corp. v. Silver, at 4851 n. 4, 4852.

[12] Though it is not certain from the opinion, it would appear that the Petitioner in Mohasco was attempting to assert that the filing requirements of 42 U.S.C. §2000e-5(c) and (e) required a person to file a complaint with either the federal or state agency not later than 180 days notwithstanding the fact that a filing with a state agency subsequent to 180 days but less than 300 days amounted to a timely filing with the State agency, Olson v. Rembrandt Printing Co., 511 F.2d 1220 (8th Cir. 1975). This argument, that Congress designated a 180 day filing requirement with all state agencies, was rejected citing with approval the holding and analysis of Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976). In Doski, the Court accepted the EEOC's contention that the filing requirements of 42 U.S.C.

even when the initial filing with the State agency is untimely and greater than 180 days from the date of the alleged discriminatory occurrence. Respondent's position is not supported by Mohasco supra, Love v. Pullman Co., 404 U.S. 522 (1972) nor Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). None of these cases considered an untimely filing such as Respondent's [13].

Since Respondent has failed to identify any discriminatory acts occurring within 180 days of his filing with the EEOC, it is clear that no such acts come within Delaware's shorter 120 day period. Moreover, even if a tolling concept were adopted, as suggested in EEOC v. Delaware

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§2000e-5 do not require a person to file a complaint with the State agency within 180 days provided that State law allows a longer period for filing.

[13] In these three cases a timely filing was made either with the deferral state agency or with the EEOC within the shorter federal period (90 or 180 days).

Trust Co. 416 F. Supp. 1040, 1044 n. 9 (D. Del. 1976) on the date that a charge was filed with the EEOC, Respondent still cannot identify an occurrence regarding his denial of tenure that was timely filed.[14]

The actual offering of a contract in August of 1974 and the denial of Respondent's grievance have been offered

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[14] The only allegations that come within 180 days of the April 4, 1975, filing involve Defendant McLaughlin's alleged assault upon Plaintiff and the allegation that the President of the College subsequent to that assault refused to reevaluate Plaintiff's tenure status. The assault allegations are totally irrelevant to the denial of tenure which occurred in the spring of 1974, nor were they properly made a part of Plaintiff's complaint to the EEOC. (Ct. of App. A. 18) Additionally, there are no allegations that subsequent to the Board of Trustee's determination to deny Plaintiff tenure, there exist additional proceedings wherein the President of the College can review and reverse this decision. Informal requests for reconsideration are not sufficient to breath life into a stale claim, United Airlines v. Evans, 431 U.S. 553, 556 (1977); see also Meyers v. Pennypack Woods Home Ownership Assn., 559 Fed. 2d 894, 899 (3d Cir. 1977).

as occurrences for which a complaint was timely made. (EEOC Br. 24, 26, Resp. Br. 8) However, the August act occurred 237 days prior to the Respondent's filing with the state agency and 230 days prior to his filing with the EEOC for purposes of tolling the state statute of limitations. The September 12, 1974 occurrence was 210 days prior to filing with the state agency and 203 days prior to filing with the EEOC. Both of these occurrences were beyond the state statute of limitations of 120 days and would be untimely filed for state consideration even utilizing the 180-day filing period noted by the Court recently as means to insure meaningful resort to state administrative proceedings.[15]

The EEOC's own regulations do not support this position. Only

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[15] Oscar Mayer & Co. v. Evans, 441 U.S. 750, 764 n. 11 (1979)

complaints received by the EEOC, which are more than 180 days from the date occurrence and still within the state agency period of limitations get deferred pursuit to the requirements of Love v. Pullman Co., supra, 29 C.F.R. 1601.13(d)(2)(iii) (1979). An identical regulation existed at the time of the Doski decision, 29 C.F.R. §1601.12(b)(1)(v)(A) (1975).

In Mohasco Corp. v. Silver, supra, the approach utilized in Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) was approved. However, the issue of a timely filing with the state agency was not presented in Moore, nor is there anything in Moore to indicate that state statutes of limitations have no role in the filing requirements of a Title VII claim.[16]

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[16] In Moore the Plaintiff was discharged on October 17, 1967, and filed with the State agency on October 19, 1967. At the time of the filings, Illinois had a 120-day statute of limitations, 48 Ill. Anno. Stats. §858 (1961). Additionally,

Respondent and EEOC contend that the mere filing of a complaint well beyond the state statute of limitations period and the 180-day federal limitation period should be treated as a bonafide state referral, though on its face the state agency has no authority to pursue such stale claims.[16a] Petitioners do not believe that such a result was intended by the language of the statute or the Congress. Recently, the relationship between State and Federal proceedings in the Title VII area were reviewed. New York Gas Light Club, Inc. v. Carey, ____ U.S.____, 64 L.Ed. 2d 723 (1980). In particular, the Court noted the

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the last pertinent date considered by the Court was an allegation of harassment requiring the Plaintiff to seek a transfer which was requested on August 7, 1967. Clearly, either of these dates complied with the state statute of limitations. Thus, there was no issue concerning a "bonafide" deferral to the state agency.

[16a] 19 Del. C. §712(b) which authorizes the agency to investigate discrimination charges is contingent on

congressional intent that state and federal remedies should supplement one another. It was noted at page 734 that:

> "Congress envisioned that Title VII's procedures and remedies would 'mes(h) nicely, logically, and coherently with the state and city legislation,' and that remedying employment discrimination would be an area in which [t]he Federal Government and the State Governments could cooperate effectively." 110 Cong. Rec. 7205 (1964) (Remarks of Senator Clark).

Acceptance of the Respondent's position would effectively eliminate the requirement of complying with state filing requirements which are no more onerous than the 180 day federal requirement, or require State agencies to disregard their statutory jurisdictional requirements and act upon stale claims. Such results

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such charges being timely filed. 19 Del. C. §712(d):

> A charge under subsection (b) must be filed within 90 days after the alleged unlawful employment practice or 120 days after discovery thereof, whichever is the later.

surely do not comport with the congressional intent of meshing the federal and state remedies.

Many courts have rejected the position asserted by the Respondent on the basis that it deprives the state agencies of a meaningful deferral and is inconsistent with the language of 42 U.S.C. §2000(e)-5(c) & (e) which require that the State or local agency be one with authority to grant or seek relief from the alleged discriminatory practice. The elimination of the state filing requirement, as suggested by Respondent, has the effect of removing the authority placed in state agencies where their statutory creation restricts their activities to occurrences which are filed with them within certain time periods.[17]

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[17] Numerous courts have held that the state filing time limitations or the minimal federal filing limitations, whichever is longer, should be complied with in order to utilize the extended limitation period. Dubois v. Packard Bell Corp., 470

In Mohasco, this Court noted that there was nothing in the legislative history of Title VII to suggest that the complainants in some states were to be allowed to proceed with less diligence than those in other states. However, that is the rule that the Respondent is now urging upon the Court. An act of discrimination which occurred 200 days prior to filing a claim in a nondeferral state is untimely. However, that same occurrence, if filed with the state agency on the 200th day, is claimed to be timely

F.2d 973 (10th Cir. 1972) Doski v. M Goldseker Co., supra; Ewald v. Great Atlantic & Pacific Tea Co., 620 F.2d 1183 (6th Cir. 1980) (concerning age discrimination, 29 U.S.C. §626) Bonham v. Dresser Industries, Inc. supra., (dealt with age discrimination statutes); DeGideo v. Sperry- Univac Co., 415 F. Supp. 227 (E.D. Pa. 1976); Mobley v. Acme Markets, Inc., 473 F. Supp. 851 (D. Md. 1979); Bertsch v. Ford Motor Co., 415 F. Supp. 619 (E.D. Mich. 1976); Ugianski v. Flynn and Elrich Co., 337 F. Supp. 807 (D. Md. 1972) Ashworth v. Eastern Airlines, Inc., 389 F. Supp. 597 (E.D. Va. 1975); Williamson v. Chevron Research Co., 12 FEP Cases 96 (N.D. Cal. 1976).

despite the fact that the claimant has failed to comply with the state filing limitation or the minimal 180-day period required in a nondeferral state. Such a practice would be an empty meaningless gesture and a mere pretext to revive a stale claim. Additionally, Respondent's position requires a finding that Congress intended to impose upon all state agencies an expandable limitation period for processing discrimination claims of between 240 and 300 days despite the existance of state statutes.[18]

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[18] This interpretation does not comport with the following legislative history noted in Moore v. Sunbeam Corp., supra, 825 n. 35 which stated:

> "Section 706(d) establishes a 90-day period of limitations on the filing of a charge, with appropriate provisions to extend the period in the situation in which prior resort is had to a State agency. Moreover, §706(d) is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to state or local

Even if Respondent's position were accepted, the denial of tenure and offering of a terminal year contract occurred more than 300 days prior to Respondent's filing with the EEOC on April 28, 1975, since these occurrences transpired prior to July 2, 1974. Respondent asserts that he can avoid the timeliness problem by claiming that the statements received by Respondent on June 26, 1974 had the effect of tolling the filing requirements until he was advised of the outcome of his grievance. This argument runs counter to the reasoning of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), where, as here, all benefits of the status sought ceased when the decision was made and would not be accorded the employee unless he prevailed in the

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authority. Such a person will not lose his right to seek federal relief simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." Senator Humphry, Leg. Hist. at page 3006.

grievance procedure. The decision to deny tenure was made by the Board of Trustees on March 13, 1974 (Respondent's Brief 2). If this action were discriminatory, as claimed by Respondent, the time for filing a claim began on that date. Even if the Respondent's argument, that the letter of June 26, 1974, mislead the Respondent into thinking he could await the outcome of the grievance procedure were accepted, it is only from that date until he received such word that the 300-day period would be tolled. The period from the decision to deny tenure to the earliest filing on April 4, 1975, is still more than 300 days when the period from June 26 through September 12 is not counted.[19]

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[19] Cases considering tolling of the time limitations would not support the Respondent's contention under the facts of this case, Chappel v. Emco Mach. Works Co., 601 F.2d 1295 (5th Cir. 1979); Rudolph v. Wagner Elec. Corp., 586 F.2d 90 (8th Cir. 1978), reh. en banc den. (1978). Strozier v. General Motors Corp., 442 F. Supp. 475 (N.D. Ga. 1977), Wood v. Southwestern

CONCLUSION

For the reasons stated herein and in the Petitioners' Opening Brief, the judgment of the Court of Appeals, insofar as it reversed the dismissal of the Complaint against the Petitioners should be reversed.

Respectfully submitted,

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Bell Telephone Co., 422 F. Supp. 41 (E.D. Mo. 1977) reversed and remanded on other grounds 580 F.2d 339 (8th Cir. 1978), cf. Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980).